IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1165

CHICAGO TITLE AND TRUST COMPANY, as Trustee Under Trust Number 47,554, and JACK A. CONEY,
Petitioners,

vs.

AUDREY BRIDE LISNER, JACQUELINE MARIE LISNER, and JANNETTE ALECIA LISNER,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit

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Petitioners pray that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Seventh Circuit entered in the above entitled cause on 2 October 1978 reinstating its opinion of 14 August 1978 which reversed a judgment of the United States District Court for the Southern District of Illinois in favor of Petitioners, dismissing Respondents' Complaint.

OPINIONS BELOW

The opinion of the United States Court of Appeals is set out in Appendix A. The order of the United States Court of Appeals denying Petitioners' petition for rehearing *en banc* is set out in Appendix B. The order and opinion of the United States District Court for the Southern District of Illinois is set out in Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals below was entered on 14 August 1978. The order of the United States Court of Appeals denying Petitioners' petition for rehearing *en banc*, set out in Appendix B, was filed on 2 October 1978. This Petition for Writ of Certiorari was filed within ninety (90) days of the latter date. The jurisdiction of this Court is invoked under ch. 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether death of a preceding tenant is a precondition to the exercise of a succeeding life tenant's power of appointment by deed, or merely a limitation upon the effective moment of such exercise.

2. Whether the grantor and heirs of the grantor are estopped from maintaining an action to set aside the grantor's exercise of a power of appointment by deed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following provisions are reprinted in pertinent part in Appendix D:

1. Ill.Rev.Stat., ch. 28, §1;
2. Ill.Rev.Stat., ch. 30, §6;
3. Ill.Rev.Stat., ch. 30, §8.

STATEMENT OF THE CASE

Isadore Bride was born on 12 February 1880. His only child, Audrey Bride Lisner, was born on 4 July 1937.

Isadore's brother, Nicholas Bride, a bachelor, lived with Isadore until Nicholas' death in 1957.

Nicholas executed his Will on 30 August 1951 and a codicil on 16 March 1953. The codicil revised paragraph Fifth of the Will. As revised, paragraph Fifth read in pertinent part:

> "After she [Audrey] shall have also attained the age of 25 years and become entitled, also, to the income from such real estate, said Aubrey Jean Bride shall have full power and authority to sell, dispose of and convey all or any part or parts of said real estate at any time or times and the purchaser or purchasers thereof shall not be required to look to the application of the proceeds of such sale but shall take full and complete title by deed or deeds from my said niece."

Audrey was married in 1958 and had two children; Jacqueline, born 18 May 1962, and Jannette, born 20 July 1963.

On 10 December 1964, a Warranty Deed from Audrey Lisner and by and for her husband, Jerry Lisner, was recorded conveying and warranting to Chicago Title and Trust Company as Trustee the subject real estate "subject to outstanding life estate in Isadore J. Bride under the terms and provisions of the Last Will and Testament and codicil of Nicholas Bride, deceased. This conveyance is made pursuant to the power and

authority contained in the said Will of Nicholas Bride, deceased." The deed was acknowledged by Elvin F. Skaggs, a California notary public, that on 6 December 1964, Audrey Lisner appeared before him in person and acknowledged that she had signed the deed.

Jack A. Coney was and is the sole beneficiary of the land trust pursuant to a trust agreement entered into by Petitioners on 8 December 1964.

On 14 January 1977, more than 12 years after recording the Warranty Deed, Respondents filed a complaint in the United States District Court for the Southern District of Illinois challenging the deed and praying that:

> (a) The court declare that the intention of Nicholas Bride was that Audrey not have the power to dispose of or convey any interest in the property until after the death of Isadore J. Bride, or
>
> (b) The court determine that the signatures on the deed are not genuine, or
>
> (c) The court declare that Audrey was overreached in transferring her interest in the property, and, therefore, that the transfer is voidable.

Various motions to dismiss, briefs and a motion for summary judgment were filed by Petitioners, and Respondents filed various briefs and its motion for summary judgment. On 7 November 1977, the United States District Court for the Southern District of Illinois in its Decision and Order denied Respondents' motion for summary judgment and granted Petitioners' motion for summary judgment dismissing Respondents' complaint.

On 14 August 1978, the United States Court of Appeals for the Seventh Circuit Justices T. E. Fairchild (Wisc.), W. F. Pell, Jr. (Ind.) and R. W. Harper (Missouri) reversed and remanded the judgment of the Federal District Court sitting in Illinois "with directions to enter summary judgment at least in favor of Jacqueline and Jannette on the issue of the affect of Audrey's conveyance." It is this order of the Court of Appeals of the Seventh Circuit that is the subject of this petition for certiorari.

ARGUMENT

I

The death of a preceding tenant is not a precondition to the exercise of a succeeding life tenant's power of appointment, it is merely a limitation upon the effective moment of such exercise.

The general common law rule binding upon all states is that the death is not a precondition but merely a limitation upon the effective moment of such exercise.

Here the testator, Nicholas Bride, intended that Respondent, Audrey Bride Lisner, (hereinafter "Audrey") have a general appurtenant power of appointment by deed or will over the land in question: (a) when she shall have attained the age of 25 years, and (b) when she shall become entitled also to the income from said property. The first event stated above is not at issue; Audrey has reached her 25th birthday. Audrey's reception of the income from the property is by the will synonymous with the death of her father, the preceding life tenant. At the age of 98 he is still alive. Audrey's execution of the Warranty Deed thus was prior to the date she "shall become entitled also to the income from the property."

The issue is: Whether the second event imposes an absolute precondition to exercise of the power, or whether the second event is merely a limitation on the effective moment of the previously exercised power?

No court in Illinois has ever had opportunity to consider the precise issue.

The foremost authority on the law of future interests in Illinois has stated that the general common law pertinent to this issue is also the law of Illinois. Carey and Schuyler in *Illinois*

Law of Future Interests, Section 386 (1944), states that, "a power may sometimes be effectively exercised by an instrument executed before the power comes into being." The authors cite *Johnson v. Touchet*, 37 L.J.R. (N.F.) 25 (Ch. 1867) as authority for their position and conclude that Illinois courts would take the same view as did the chancery court there.

In *Johnson v. Touchet, ibid*, a testator willed to defendant Touchet, and two others as trustees, the residue of his real and personal estates. One-fifth of the trust was to be held for the benefit of one Ann Dennis and further to be held in trust for the benefit of such persons as she may appoint by deed or will "after she shall attain the age of 25 years, and not before." By an indenture made between the plaintiff Johnson, Ann Dennis, defendant, and one James Dennis (also a beneficiary under one of testator's other testamentary trusts) and in consideration of her forthcoming marriage to plaintiff, Ann Dennis entered into a covenant to exercise her power of appointment over any and all of the property devised and bequeathed to her by testator which she might at any time thereafter have power to appoint, in favor of plaintiff. Said covenant to exercise was made subject to the consummation of the proposed marriage and the attaining, by Ann Dennis, of 25 years of age. At the time of the execution of the above described covenant, Ann Dennis was merely 23 years of age. The proposed marriage was subsequently solemnized.

Ann Dennis died at the age of 28 without ever having exercised her power of appointment in favor of the plaintiff.

Plaintiff sought to have the covenant deemed a valid exercise of the power of appointment by the court of equity. The court began its analysis by stating: "The principles on which cases of this description depend are well settled. A covenant to exercise a power, if it has any operation at all, has it from the time of the execution of the covenant."

The court then summarized plaintiff's and defendant's positions by stating:

> "The main argument against the alleged operation of the covenant in the present case was, that there was an express provision in the creation of the power that it should not be exercised until the donee of it should have attained the age of 25 years. It appears, however, that the donee, at the age of 23 years, executed the covenant which is now asked to be declared a valid exercise of the power."

Here, in a strikingly similar case, the English chancery court had before it the clear expression of testator's intent with a "premature" exercise of the power. The court proceeded:

> "The object of the donor of the power, in providing that the donee should not exercise it until 25 years of age, is fully attained by the circumstance that from the nature of the covenant itself, it could have had no operation if the donee had died before attaining the age of 25 years."

The court proceeded to announce its holding consistent with the early common law and focusing specifically on the non-occurrence of the powers "precondition" as of the time of the covenant.

> "There cannot, I think be a doubt, where there is a covenant of this kind, that, if the donee, having executed the covenant, survive the prescribed age, but refuses to perform the covenant by executing a formal appointment, this court will compel him to do so."

> "The effect of such a covenant is to bind the property by an equitable execution of the power. I abide by all that is stated in the report of my judgment in the case of *Affleck v. Affleck*. The decision arrived at in that case was founded on the accurate statement of the principles laid down by Lord Redesdale in *Shannon v. Bradstreet*. There, Lord Redesdale, in speaking of powers said: 'It has been determined that a covenant is a sufficient declaration of intent to execute, even when made before the power arose, as where a power is limited to be exercised by a tenant for life in possession, and he covenants that when he comes into possession, he will execute. In all these cases courts of equity have relieved.' There, as in other cases, the covenant was made before the strict right to execute the power had, according to the terms of it, arisen; but it was decided that there was no substantial reason why the court should refuse to treat the covenant as a sufficient execution of the power."

The defendant there raised an argument concerning the interest of Ann Dennis' children, the designated takers by default in testator's will. The court again in this remarkably similar case stated:

> "The other argument put forward in the present case to induce the court to treat this covenant as an invalid execution was, that the children, who are the objects of the original power as well as of the marriage settlement, will, if the covenant in it is not held to be an execution of the power, take immediately, under the limitation in the will, in default of appointment. But then the question still remains the same. If the covenant is a valid execution of the power, it cuts off the limitation in default of appointment. The case of the children might have been better if the covenant had not been executed."

Thus, in a factual situation which is strikingly similar to the present case, the clear and long standing common law rule gives affect to an agreement to exercise a power of appointment made prior to "having" the power and subject to its coming into being. *Johnson v. Touchet* is one of the more recent announcements of this firmly established common law rule.

The line of cases applying this rule is ancient and substantial. The case of *Jackson v. Jackson*, 4 Bro.C.C. 462 (Ch. 1793), involved a situation wherein M. Jackson held a life estate in certain properties with a remainder entailed to his son. A settle-

ment was made which gave the son a power of jointure (an *inter vivos* power exercisable in favor of one's wife) over certain of the properties when he should be in possession thereof. M. Jackson and his son entered into an agreement that the son would within 12 months exercise his power of jointure in favor of a then intended wife. M. Jackson subsequently died and his son then took possession but also died without ever making the agreed jointure. The son's widow prayed the court to find the above described power of jointure as exercised in her favor. The court held that the power was exercised even though done before the son acquired possession of the property.

In *Affleck v. Affleck*, 29 L.J.Rep. (N.S.) 358 (Ch. 1856), real estate was devised to several succeeding life tenants with *inter vivos* power in these tenants to appoint a jointure to any woman whom they might respectively marry. Said power would come into being for each life tenant when and if he was in possession of the real estate. One of the tenants, even though not yet in possession, made a covenant with his wife at the time of his marriage that, if he should come into the possession of the devised estate, he would execute the power of jointuring in favor of that wife. After this and before coming into possession of the lands he became legally incompetent, and thus legally unable to exercise any power. The said life tenant remained incompetent until his death, but did before his death become entitled to possession. The court was asked to decide whether the tenant's widow was entitled to have the appointment enforced.

It was stated by the court there:

> "It has been determined that a covenant is a sufficient declaration of intent to execute, even when made before the power arose, as where a power is limited to be exercised by a tenant for life in possession, and he covenants that when he comes into possession he will execute. In all these cases courts of equity have relieved."

The court further held that:

> "The court acts on the principle that the covenant, as a defective execution of the power, affects and binds the land as soon as the time arrives at which the covenantor has authority to bind the land."

In *Wandesforde v. Carrick*, 5 Irp.Reps. 486 (Ch. 1871), the court was confronted with an exercise of a power of revocation by deed or will. The power was found by the court to be contingent upon a particular event. Despite the fact that the power had been exercised by will prior to the occurrence of the event, the court found such exercise to have effect. Concerning the validity of the exercise, the court stated:

> "Where a power is given to a designated person, to be executed upon a contingency, it may be executed before the happening of the contingency, and the execution of it will be valid on the subsequent happening of the event."

In the case of *Dalby v. Pullen*, 2 Bing. 144 (Ch. 1824), the testator devised his entire estate to A for life and after A's death to B in fee simple. The testator also gave A a general power of appointment by deed or will over said estate to be exercised by A if and when B should die during A's lifetime with no issue with A likewise at that time having no issue. A and B proceeded to join together in various covenants and deeds the sum effect of which were to exercise A's contingent power of appointment over the estate in favor of C in fee simple. Subsequently, B died in A's lifetime without issue. Nor had A any other issue.

The court there held that the exercise of A's power was well made notwithstanding that the execution was prior to the occurrence of the "preconditions" established by the testator.

In the case of *Sutherland v. Northmore*, Reg.Lib.A.Fol. 431 (Ch. 1729), concerned a power held by A to raise money by

mortgage or disposition of land. Said power was created in A pursuant to her wedding settlement but could be exercisable only after her husband's death. While her husband was still living, A nonetheless executed her power over the land in favor of B. A's husband later died, and B sought enforcement of the execution in his favor. The court held the power well executed.

In *Alford v. Alford,* 2 Will.Rep. 231 (S.C.), 2 Eq.Ca.Abr. 659 (Ch. 1709), B held a life estate with a remainder to his first and other sons entail with a power in B after A's death without issue to make a marriage jointure. A was the preceding life tenant in the land. B maried during A's life and covenanted to make a jointure and to exercise his power should he come into possession of the land. A later died without issue but with B surviving him. B however subsequently died without making a jointure. B's widow sought in this action to have the jointure made by the chancellor. The court decreed accordingly in favor of the widow.

In summary, from the above numerous primary authority, it is clear that under the common law of England, and thus Illinois, an attempted exercise of a contingent general power by deed or will prior to the occurrence of a precondition will be held to be a valid exercise of the power and enforceable in equity, subject only to the subsequent occurrence of the contingency. Therefore, the death of a preceding tenant is not a precondition to the exercise of a succeeding life tenant's power of appointment, but is merely a limitation on the effective moment of such exercise.

This common law rule is binding upon the State of Illinois. Chapter 28 Illinois Revised Statutes, Section 1 states as follows:

> "The common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British Parliament made in aid of, and to supply the defects of the common law, prior to the fourth year of James the First . . . shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority."

The fourth year of James the First is the year 1607. While none of the above cases were decided prior to that time, it should be noted that the statute adopts the "common law" prior to 1607. The Illinois statute does not limit itself to judicial decisions prior to 1607. The term "common law" imparts the concept of a complete legal system or body of law. That no decisions announcing the general rule, as here developed, have been found dating prior to 1607 is not to say that the rule was not in fact a part of the "common law" at that time. In fact, several cases have been found which date to within approximately a century of 1607. These very early cases clearly state the common law as applicable to the State of Illinois.

It is clear, therefore, that the termination of Isadore's life estate was not a condition precedent to the effective execution of the power in Audrey. Rather, Isadore's death would only serve as a limit upon the effective moment of the powers exercised. Such a limit would clearly serve to carry the testator's intent. The contingency of Isadore's death was only a bench mark as to the date and execution of the power would take effect. The Seventh Circuit Court of Appeals by its decision has created an undesirable situation with potentially serious consequences regarding real estate transfer in the State of Illinois and elsewhere in the nation. Further, it has announced a rule contrary to the public policy of Illinois as declared in Chapter 28, Illinois Revised Statutes, Section 1.

In its decision the Seventh Circuit Court of Appeals mistakenly relies upon the case of *Northern Trust Company v. Porter,* 368 Ill. 256 (1938). The Seventh Circuit Court of Appeals held at page 5 of its decision:

> "Nor will it do to treat the deed as a contract to exercise not allow such contracts to be enforced."

the power when it becomes exercisable, for the law does Reliance upon the *Northern Trust Company v. Porter, supra,* case is misplaced for the following reasons.

First, the "powers" as construed in the *Northern Trust Company, supra,* and the instant case are not the same. In the *Northern Trust Company* case the court held that:

> "The donor in giving a general power to appoint by will only, intends that the donee shall retain his discretion as to who will receive the property subject to appointment until the time of his (the donee's) death,"

and that the donee cannot contract to change his testamentary powers. Naturally. Where a power is limited to being exercisable by will only, of course a contract will not suffice. In the present case, however, there is a vested life estate coupled with a power in Audrey to sell the fee during her lifetime. The testator's codicil states:

> "Said Audrey Jean Bride shall have full power and authority to sell, dispose of and convey all or any part or parts of said real estate at any time or times and the purchaser or purchasers thereof shall not be required to look to the application of the proceeds of such sale, but shall take full and complete title by deed or deeds from my said niece."

Second, the Illinois Supreme Court in the decision specifically limited the *Northern Trust Company* case to general powers of appointment to be exercised by will. The court stated:

> "It must be borne in mind that we are concerned *only* with the general power of appointment by will, *not* with the special power of appointment or a power to appoint by deed or will." (emphasis added)

The Illinois Supreme Court, perhaps recognizing that its decision in a power of appointment by will case might be used as authority in a power of appointment by deed or will situation,

specifically limited its decision to the former. But, in the case presently before the bar, there is a power to sell by deed, not a power to appoint by will, and a deed was given. Nothing could be clearer than the words of the Illinois Supreme Court itself that the *Northern Trust Company* case has no bearing upon the instant litigation and was wrongfully relied upon by the Seventh Circuit Court of Appeals in its decision.

Finally, Chapter 30, Illinois Revised Statutes, Section 6 provides specifically for the conveyance of an after-acquired title.

That statute provides:

> "If any person shall sell and convey to another, by deed . . . purporting to convey an estate in fee simple absolute, . . . not then being possessed of the legal estate or interest therein at the time of the sale and conveyance, but after such sale and conveyance the vendor shall become possessed of and confirmed in the legal estate to the land . . . so sold and conveyed, it shall be taken and held to be in trust and for the use of the grantee . . . and the conveyance aforesaid shall be held and taken, and shall be as valid as if the grantor or vendor had the legal estate or interest, at the time of said sale or conveyance."

The Illinois legislature by statute has specifically provided for conveyance by deed, as here, taken and held in trust and considered "as valid as if the grantor or vendor had the legal estate or interest, at the time of said sale or conveyance." This statute, commonly referred to as the "after-acquired title" statute, clearly shows the intention of the Illinois legislature to give full force and effect to conveyances such as before the court.

In a similar case before the Illinois Supreme Court, *Rosenthal v. First National Bank of Chicago,* 40 Ill.2d 266 (1968), the question involved whether a secondary life tenant having a power to appoint the remainder interest could legally exercise that power before expiration of the primary life estate. The

Illinois Supreme Court held that it was immaterial whether the appointment occurs before or after termination of the primary life estate, and that the appointee under the power takes as a remainderman, with enjoyment and possession merely deferred pending determination of the primary estate.

In summary, with respect to the first issue, it is clear by the common law of the State of Illinois that the death of a preceding tenant is not a precondition to the exercise of a succeeding life tenant's power of appointment, but is merely a limitation upon the effective moment of such exercise.

If allowed to stand, the decision of the Seventh Circuit Court of Appeals would constitute the imposition of "federal common law" in violation of this court's holding in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938), which held that all federal courts must apply the law of the state. The law of Illinois, by statute and decision, is clearly defeated by the Federal Court of Appeals in this case. Every real estate transaction in the State of Illinois with similar facts is jeopardized if not wholly upset by the Federal Court of Appeals' attempt to vacate the Illinois property laws. The Federal Court of Appeals is in effect creating a federal law as to will construction and conveyancing wholly different and apart from and in conflict with the long established law in Illinois.

II

The grantor, and heirs of the grantor, are estopped from maintaining an action to set aside the grantor's exercise of a power of appointment by deed.

All of the Respondents, including the minor children, are estopped from maintaining their causes of action because of the statutory covenants of warranty contained in the Warranty Deed given by Respondent to Petitioners. Chapter 30, Illinois Revised

Statutes, Section 8, provides that as grantor of a Warranty Deed Respondent Audrey warranted to grantee, Chicago Title and Trust Company, "the quiet and peaceable possession of such premises, and will defend the title thereto aga[illegible] all persons who may lawfully claim the same, and such convenants shall be obligatory upon any creditor, his heirs and personal representatives, as fully and with like effect as if written at length in such deed". From the plain reading of this statute, Respondent Audrey and the two minor children, Jacqueline and Jannette, her heirs, are bound by the express statutory covenant of warranty contained in the Warranty Deed and by law they are bound to defend the title, not challenge it. In the case of *Biwer v. Martin*, 294 Ill. 488 (1920), the court held that:

> "It is settled in this state that a grantor in a deed is not allowed to attack a title the validity of which he has convenanted to maintain. By such a deed the grantor warrants to the grantee, his heirs and assigns, the possession of the premises and that he will defend the title granted by the terms of the deed against persons who may lawfully claim the same, and that such convenant shall be obligatory upon the grantor, his heirs, personal representatives and assigns. This is true whether the deed conveys a present or future interest."

The Seventh Circuit Court of Appeals acknowledged the statute and the *Biwer* case but declined "the invitation" to apply same because "under the terms of Nicholas' will and codicil, Audrey will not, even at Isadore's death, acquire title to the property in fee, and it is the title which is warranted and which creates the estoppel." This decision completely overlooks the plain language previously quoted and set forth of the testator's codicil, which reads in pertinent part:

> "After she shall have attained the age of 25 years and become entitled, also, to the income from such real estate, said Audrey Jean Bride *shall have full power and authority*

to sell, dispose of and convey all or any part or parts of said real estate at any time or times and the purchaser or purchasers thereof shall not be required to look to the application of the proceeds of such sale but shall take full and complete title by deed or deeds from my said niece."

Clearly Audrey will acquire title to the property in fee as she has "full power and authority to sell" and the purchasers shall take "full and complete title by deed or deeds."

Indeed, Respondents have never argued otherwise and have conceded that Audrey had the power to convey the fee interest to Petitioners. Page 5 of Respondents' Reply Brief alleges that the codicil to the will gave a life estate in Audrey "with a power to convey the fee." Page 6 of Respondents' Reply Brief contains the admission again made that Respondent had the power to convey the fee interest.

Accordingly, the interpretation placed on the codicil by the Seventh Circuit Court of Appeals was a decision not argued by any party at any time, not prayed for in Respondents' complaint, and by the terms of the codicil above quoted clearly not warranted.

The analysis of this will and the conveyance by the Seventh Circuit Court of Appeals jeopardizes all such transfers by remaindermen.

Since Respondent did acquire the power to convey the property in fee, the Seventh Circuit Court of Appeals' rejection of the *Biwer* case is unfounded and conflicts with that case's clear holding with respect to the ability of grantees in the State of Illinois to rely upon warranties received from the grantor. Accordingly, all of Respondents are estopped from maintaining an action, as here, to set aside the grantor's exercise of the power of appointment by Warranty Deed.

Again, the decision of the Seventh Circuit Court of Appeals on this issue must be construed as the invocation of an undetermined "federal common law" in violation of the *Erie R. Co. v. Tompkins, supra,* rule prohibiting same.

Real estate transfers should be, as a matter of elementary public policy, as stable and predictable as precedent will allow. It is no exaggeration that the court of appeals in this case has cast a shadow over land titles throughout the entire State of Illinois and to the extent that it may be cited elsewhere, in other states, by substituting its own "federal common law" for the laws of the State of Illinois.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

In the
United States Court of Appeals
for the Seventh Circuit

No. 78-1028

Audrey Bride Lisner, Jacqueline Marie Lisner, and
Jannette Alecia Lisner,
Plaintiffs-Appellants,

v.

Chicago Title and Trust Company, as Trustee under
Trust Number 47554, and Jack A. Coney,
Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Illinois, Peoria Division.
No. 77-C-1005—Robert D. Morgan, *Judge*.

Argued May 26, 1978—Decided August 14, 1978

Before Fairchild, *Chief Judge*, Pell, *Circuit Judge*, and Harper, *Senior District Judge*.*

Pell, *Circuit Judge*. Nicholas Bride (Nicholas) died in 1957, seised of a farm in Woodford County, Illinois. His will devised a life estate in the farm to his brother, Isadore Bride (Isadore),

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* Senior District Judge Roy W. Harper of the Eastern and Western Districts of Missouri is sitting by designation.

followed by a second life estate to Isadore's daughter, plaintiff-appellant Audrey Bride Lisner (Audrey), with the remainder in fee to Audrey's children. At the time of Nicholas' death, Isadore was 77 years old. He is still living.

In the 1951 will executed by Nicholas (superceded as discussed *infra* by a 1953 codicil) it was provided that after Isadore's death and prior to Audrey's attaining 35 years of age, a trustee would collect rents and incomes and pay expenses on the property and pay to Audrey only the net income from the farm. The will also created a power in Audrey to convey the property once she attained 50 years of age. The 1953 codicil set forth more liberal provisions. After restating the life estate to Isadore and the subsequent life estate to Audrey, the codicil stated, as pertinent:

> After the death of said Isadore . . . and until said Audrey . . . shall have attained the age of twenty-five years, said real estate shall be managed and looked after for her benefit by [a trustee] . . . After she becomes entitled to receive the income from such real estate herself, she shall pay all . . . expenses . . . and keep said premises in a proper state of repair. *After she shall have attained the age of twenty-five years and become entitled, also, to the income from such real estate, said Audrey . . . shall have full power to sell, dispose of and convey all or any part or parts of said real estate.* . . . In the event of any such sale or sales by her, my said niece shall be entitled to the proceeds of such sale or sales without any further accounting therefor. This power shall not give my said niece the right or authority to mortgage or create any lien on said real estate. [Emphasis added.]

Audrey left her father's home to attend college in California, where she has since resided. She married, and later was divorced in 1963. By the fall of 1964, her husband having made no support payments, she was in serious need of funds. She was also

suffering from physical ailments. She communicated with one Thomason, a Peoria, Illinois lawyer, about selling the Woodford County farm. Thomason, in turn, got in touch with a local real estate broker who had, from time to time, been employed by defendant-appellee Jack A. Coney. The broker discussed the farm with Coney, an attorney who devoted substantial time to the real estate business. In due course, Coney and Audrey agreed to a sale of the farm at the price of $13,500,[1] the consideration was paid and a deed was given. There is no dispute that both parties to the sale understood that Audrey was conveying a remainder in fee simple, subject to Isadore's life estate.

This action was brought in 1977 to obtain relief in the form of alternative declarations that Audrey had no power to dispose of or convey any interest in the farm until after Isadore's death, and that the deed is therefore void; that the purported signatures on the deed recorded[2] are not genuine and that the deed is thus void; and that Audrey was overreached in the deal, making the transfer voidable. The district court dismissed the complaint insofar as it alleged overreaching (and thus fraud) for failure to plead with the specificity required by Rule 9(b), Fed. R. Civ. P., and on cross-motions, granted summary judgment to the defendants[3] on the claim that Audrey had no power to convey a remainder in fee. The court construed Nicholas' will and codicil as imposing a limit on Audrey's power to appoint the property

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[1] The per acre price was approximately $75. An affidavit filed in opposition to the motion for summary judgment, apparently not disputed as to accuracy, stated the value in late 1964 was $375 per acre.

[2] Although Audrey conceded in her pleadings that she had executed a deed, she indicated that it was in *quitclaim* form. The deed which was recorded was a warranty deed. The complaint alleged, and Audrey's affidavit avers, that the warranty deed is not the deed she executed.

[3] Audrey's conveyance was to Chicago Title and Trust Company as trustee of a land trust in which Coney held the beneficial interest. Chicago Title was thus made a party defendant in that capacity.

before Isadore died, but reasoned that the limit was merely a condition on the exercise of the power, and that the appointment was therefore effective, with Coney's enjoyment of its benefits to be deferred until the condition occurred.[4] Audrey and her children (and co-plaintiffs), Jacqueline and Jannette, have appealed.

We address the primary issue, the effectiveness of Audrey's conveyance, first. Although the complaint alleges that Audrey could convey no interest in the farm prior to Isadore's death, plaintiffs now concede that Nicholas' will and codicil devised a vested life estate to Audrey (subject, of course, to divestment in the event Audrey predeceased Isadore), the alienation of which was not restrained under Illinois law. *See Gray v. Shinn*, 293 Ill. 573, 127 N.E. 755 (1920). The question, then, is only whether the power granted to Audrey to convey the fee remainder could be exercised before Isadore's death.

We agree with the district court that Nicholas' intent is basically clear. He had a plainly discernible concern that Audrey might immaturely and unwisely convey the fee remainder, thereby depriving her children of their interest in the farm. Although his 1953 codicil gave Audrey a power less limited than he had created in his 1951 will, his continuing concern is evident from the terms of his will as revised. Even though her father might have died, *e.g.*, in 1958, when Audrey was 21 years old, she was not to be allowed to receive gross income and pay expenses until she became 25. She was not given the power to mortgage or encumber the farm at any time. And the power to convey the fee remainder was expressly stated to arise only "[a]fter she shall have attained the age of twenty-five years *and become entitled, also, to the income from such real estate*." The emphasized language would be surplusage if construed to refer only to the fact that Audrey was not entitled to receive income directly until she reached the age of 25. That restriction was celarly articulated earlier in the pertinent codicil provision. In our opinion, the only reasonable reading is that the testator intended that Audrey have no power to convey prior to the time of her father's death, which, of course, would be the first time she could become entitled to the income from the farm. This reading has the additional virtue of giving meaning to all of the language of the devising provision. This factor has particular significance here, where the emphasized language was *added* to the devise by the same codicil that reduced the age at which the power was to be exercisable from 50 to 25. Under the provisions of the original will, Isadore would have had to live to be 107 for a limitation on the power based on his death to have any effect. Under the codicil, however, if Isadore lived nine years after its execution (to the age of 82) the additional limitation would be meaningful. We conclude, accordingly, that Nicholas' will and codicil created a power in Audrey to convey the fee remainder only after Isadore's death.

Obviously, then, Audrey's deed to Coney could not have been an exercise of the power, for the power did not then exist. Nor will it do to treat the deed as a contract to exercise the power when it became exercisable, for the law does not allow such contracts to be enforced:

> The donee of a power not presently exercisable cannot contract to make an appointment. If the promise to make such an appointment is not performed the promisee cannot obtain damages or the specific property; but the fact that the power is not presently exercisable does not prevent him from obtaining restitution of value which he has given for the promise.

3 Restatement of Property § 340 at 1902 (1940). The comments to this Restatement provision emphasize this rationale:

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[4] The court treated the prayer for a declaration that the recorded deed was not genuine as subsumed by the prayer for declaratory relief on the basis of overreaching. We thing this was error. Whether a quitclaim or a warranty deed was in fact executed by Audrey is a matter of live dispute between the parties with significance independent of the overreaching claim, as will be discussed more fully *infra*.

the donor of the power in such cases clearly intended that the donee's discretion be retained until the stipulated time. Enforcing a purported exercise of the discretion or a contract to exercise it would entirely nullify the donor's intent. This, of course, is exactly the result for which Coney contends. The Supreme Court of Illinois expressly adopted the Restatement rule in *Northern Trust Company v. Porter*, 368 Ill. 256, 266-67, 13 N.E. 2d 487 (1938),[5] and we apply it here. *See also* 2 L. Simes & A. Smith, The Law of Future Interests § 1013 at 488 (2d ed. 1956).

The district court thought a different result was indicated by *Rosenthal v. First National Bank of Chicago*, 40 Ill. 2d 266, 239 N.E. 2d 826 (1968), on which appellees primarily rely. We disagree. In *Rosenthal*, a trust fund was established with a life estate in the testator's wife and a succeeding life estate in his son, with a testamentary power of appointment in the son. Emphasizing that there was nothing in the testator's will implying that the power of appointment was conditioned on the son's surviving the wife, the court refused to infer such a condition, and accordingly held that the son's valid testamentary appointment was effective, notwithstanding that the enjoyment by the appointee would necessarily have to be deferred until the death of the wife. Here, of course, we have found—as did the district court—that the testator *did* condition the exercise of the power on the prior death of the first life tenant, Isadore. *Rosenthal* says and implies nothing about the question before us, which is whether the donee of a power can, by purporting to exercise it prematurely, destroy valid limitations on its exercise intended by the donor. *Northern Trust* and the Restatement answer that question in the plaintiffs' favor.

The district court also opined, and appellees insist, that in any event Audrey and her children are estopped to attack Coney's

[5] The Restatement rule was in tentative draft form at the time *Northern Trust* was decided, but it was finally promulgated in 1940 in identical language.

title because of the effect of the Illinois Conveyances Act, Ill. Rev. Stat. 1975, ch. 30, § 8. The statute provides that when land is conveyed by warranty deed, the grantor warrants that he or she is seised of an unencumbered indefeasible estate in fee simple and has full power to convey the same, and further warrants the quiet and peaceable possession of the premises, and that the grantor "will defend the title thereto against all persons who may lawfully claim the same." These warranties are expressly applicable to the grantor and "his heirs and personal representatives." As *Biwer v. Martin*, 294 Ill. 488, 495-97, 128 N.E. 518 (1920), makes clear, these covenants estop the grantor and his or her heirs thereafter to attack the grantee's title.[6]

We note at the outset in considering this argument that it is premised on the assumption that the recorded warranty deed was in fact executed by Audrey. Her complaint and her affidavit deny this, and the district court erred in treating the issue as undisputed on summary judgment proceedings. If, on further proceedings, it should develop that a warranty deed was executed, it may well be that Audrey would be estopped to attack Coney's title. Indeed, unless there is room to assert waiver, she may even have an obligation to defend the title. These matters may be appropriately considered on remand.

As a matter of law, however, we think it clear that Jannette and Jacqueline cannot be estopped by Audrey's warranties, if any were made. Audrey's children were given a remainder inter-

[6] *Biwer* also states the Illinois rule that if the grantor did not have title at the time of conveyance but thereafter acquires it, the title passes to the grantee by estoppel. Appellees cite this rule and, without analysis, urge us to apply it here. We decline the invitation. First, under the terms of Nicholas' will and codicil, Audrey will not, even at Isadore's death, acquire title to the property in fee, and it is the title which is warranted and which creates the estoppel. Second, and more to the point, applying the doctrine here would eviscerate the rule of *Northern Trust, supra*, and allow the intent of the donor of a power to be totally ignored, if only a warranty deed is used in a premature exercise of the power. We know of no authority for such a proposition, and appellees cite none.

est in the farm directly by Nicholas' will and codicil. Although they may in fact be among Audrey's heirs when she dies, their rights in the farm do not depend in any way on that status. Accordingly, they cannot be estopped as Audrey's "heirs" by any warranties Audrey may have made in her deed to Coney. *Ebey v. Adams*, 135 Ill. 80, 25 N.E. 1013, 1016 (1890).[7] As it is the children's remainder in fee which is most directly in issue in this litigation, it is evident that appellees' estoppel argument can have no major effect on the substantial issues herein.

In view of our conclusion that Audrey could have conveyed and did convey no more than her life estate to Coney, and that her children at least are free to attack the purported transfer of greater title, we deem it unnecessary to consider Audrey's claim that she was overreached in making her deal with Coney. By virtue of our decision, it is plain that Coney did not receive what he bargained for, and it is entirely possible that, knowing this, he will prefer to seek to set the transaction aside and obtain restitution with interest. On the other hand, it is conceivable that he will wish to affirm the transaction insofar as it conveyed to him Audrey's life estate. Isadore's life expectancy at this point cannot be other than minimal, and Audrey is only 41 years old. Should Coney wish to stand on the transaction as we have interpreted its legal effect, it will be time enough for Audrey, by a suitably specific pleading, to allege that she was overreached in conveying her life estate interest to Coney, if that is her desire. We also see no reason to consider appellees' asserted defenses of the statute of limitations, laches, ratification, and unclean hands at this time. The district court did not reach them, correctly concluding that they pertain most directly to the overreaching claim. That claim, as we have said, may well now be abandoned,

[7] Obviously, depending on the outcome of the warranty deed issue on remand, there is a real possibility of a divergence between the legal positions of Audrey and her children, who are still minors. We assume that the district court will be aware of the appropriateness of guardian ad litem representation for the children.

and there is no point in extending the length of this decision by paraenesis as to what the district court should do *if* the particular claim proceeds. We note only that the statute of limitations would clearly not bar this action by Audrey's minor children, Ill. Rev. Stat. 1975, ch. 83, § 22, nor, apparently, would laches, *see Smith v. Sackett*, 10 Ill. 534, 544 (1849); *Tearney v. Fleming*, 48 Ill. App. 507, 511 (1892), and it is impossible to conceive how the minor children could be guilty of unclean hands or held to have ratified the transaction. Appellees have made absolutely no response to appellants' arguments on this point.

For the reasons we have given, the judgment of the district court is reversed and remanded with directions to enter summary judgment at least in favor of Jacqueline and Jannette on the issue of the effect of Audrey's conveyance, and for further proceedings consistent herewith.

A true Copy:

Teste:

. . . . . .

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

October 2, 1978

Before
Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. ROY W. HARPER, Senior District Judge*

Audrey Bride Lisner, Jacqueline Marie Lisner and Jannette Alecia Lisner,
Plaintiffs-Appellants,

No. 78-1028 vs.

Chicago Title and Trust Company, as Trustee Under Trust Number 47554, and Jack A. Coney,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Illinois, Peoria Division.

No. 77-C-1005.

Robert D. Morgan,
Judge.

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by Chicago Title and Trust Company, etc., defendants-appellees, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* Senior District Judge Roy W. Harper of the Eastern and Western Districts of Missouri is sitting by designation.

APPENDIX C

In the United States District Court
Southern District of Illinois
Northern Division

Audrey Bride Lisner, Jacqueline Marie Lisner, and Jannette Alecia Lisner,
Plaintiffs,

v.

Chicago Title and Trust Company, as Trustee Under Trust Number 47,554, and Jack A. Coney,
Defendants.

No. 77-1005.

DECISION AND ORDER

(Filed November 7, 1977)

This complaint for declaratory judgment seeks to avoid the apparent legal consequences of a warranty deed, recorded in Woodford County, Illinois, which purports to have been executed by plaintiff Audrey Bride Lisner, hereinafter "Audrey."[1] The defendant, Chicago Title and Trust Company, as Trustee, hereinafter "CT", is the grantee named in said deed. The defendant Coney is the beneficial owner of the trust estate therein represented. Jurisdiction is invoked under 28 U.S.C. §1332, diversity of citizenship between the parties being alleged.

The complaint arises from the following facts. Audrey's uncle, Nicholas Bride, died, testate, on August 14, 1957, seized of the Woodford County real estate in issue. Under a codicil to his

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[1] The other plaintiffs are the minor children of Audrey.

will, he devised the real estate to his brother, Isadore Bride, for life, and, successively to Audrey for life, with remainder over to Audrey's children. That codicil provided that the realty be held in trust for Audrey until she reached her age of 25 years, should Isadore die before she reached that age. Continuing, the codicil gave to Audrey a power to convey the fee interest after "she shall have attained the age of twenty-five years and become entitled, also, to the income from such real estate." The warranty deed in issue, which recites that it is made pursuant to that power of sale, purports to convey the realty subject to the life estate in Isadore. It was recorded on December 10, 1964. Audrey attained her age of 25 years on July 4, 1962. Isadore is yet living, his age being approximately 96 years.

Defendants moved to dismiss the complaint upon the ground that it does not state any claim upon which relief can be granted. That motion is, in part, supported by affidavits as to facts outside the pleadings and therefore stands, under Rule 12(b), as a motion for summary judgment. Plaintiffs have filled a countermotion for a summary judgment declaring the deed void. The cause is now before the court upon those motions.

The complaint can be most intelligently summarized by proceeding from a recital of the prayer for a declaratory judgment, alternatively:

a. That Audrey did not have the power to convey the real estate under the Will of Nicholas until after the death of Isadore, and that therefore the recorded warranty deed is void; or

b. That the signatures on the recorded deed "are not genuine"; or

c. That Audrey "was overreached in transferring her interest in the property" and that the deed is voidable.

The body of the complaint must be characterized as evidence. It does contain the well-pleaded facts that Nicholas died seized

of the real estate, that the codicil to his will created the successive life estates and the power of sale, that Audrey reached her age of 25 years on July 4, 1962, that Isadore is yet living, and that the minor plaintiffs are Audrey's only children, and that the challenged warranty deed was recorded on December 10, 1964. It further asserts the position that Nicholas, by the said codicil, intended that the power of sale could not be exercised by Audrey until the death of Isadore.

All other allegations are conclusive and evasive of any intelligible factual statement. Thus, it is alleged that Audrey "was overreached" by unidentified persons acting in concert with Coney in 1964, and that "she was persuaded to execute a quitclaim deed" conveying her interest in the realty to some person than CT in exchange for the sum of about $12,000, which sum 'represented a small fraction" of the then value of Audrey's interest, but that that deed was never recorded. It is further alleged that the recorded warranty deed "purports to have been signed by" Audrey, but "The signatures on the deed are not genuine."

It seems clear that the language of the complaint was designed to hint at the existence of some fraud and, potentially, the forgery of the recorded deed, although such accusations are not factually alleged. It seems equally certain that those allegations are wholly insufficient to state a fraud theory. If the complaint alone was before the court, dismissal is the indicated result. However, the complaint does not stand alone, and dismissal, though it be the easy course to follow, is not inclined to promote the achievement of justice.

In addition to the complaint, the court has before it affidavits and documentary evidence submitted in support of defendants' motion and certain depositions taken at the behest of plaintiffs. From these sources there emerges an uncontested factual picture as hereinafter narrated.

Nicholas executed a will in 1951. By the fifth clause of that will, he devised successive life estates to Isadore and Audrey. That clause also designated a trustee to manage the property for Audrey until she reached her age of 35 years, and created in her power to sell and convey the remainder interest after she reached her age of 50 years. The codicil, executed in 1953, deleted and replaced the fifth clause of the will. That codicil devised the real estate to Isadore for life and, successively, to Audrey for life, with remainder over to Audrey's children or, contingent upon there being no children, to the heirs of Nicholas. The codicil also contained the power of sale as above recited.

In November, 1964, Coney was approached by Henry B. Scherrer, a real estate broker in Peoria, Illinois, at which time Coney was advised that Audrey had employed Scherrer to sell her interest in the real estate and that John D. Thomason, who Scherrer described as Audrey's attorney, had suggested to Scherrer that Coney might be interested in buying. Scherrer also told Coney that he, Scherrer, was required to be absent from the area and was withdrawing from the sales listing, but that he would, if Coney desired it, show the property to Coney before leaving. Shortly thereafter, Coney, accompanied by Scherrer and Dr. J. P. Coney, Coney's father, did inspect the land. Coney then contacted Thomason and advised him that he, Coney, offered to purchased the realty for $13,500, subject to Isadore's life estate. Coney was told to contact a William V. Lowe, described as an agent for Audrey, at North Hollywood, California.

Coney advised Lowe by a telephone conversation of his offer to purchase. He was then told by Lowe that the matter would be referred to Audrey. On November 19, 1964, Coney received a handwritten letter from Audrey, dated November 17, 1964, stating, *inter alia*, that "I hereby approve the price of $13,500.00 as value in full for the remainder interest and fee title of the property," and that you may contact "Mr. John D. Thomason"

to conclude the transaction.[2] Coney advised Thomason of the receipt of the letter and its contents, after which Coney and Thomason went to the office of CT to arrange for a title search and title insurance. When advised that CT required a copy of Audrey's birth certificate, Coney phoned Lowe. Thereafter, Audrey phoned Coney to advise him that the birth certificate was being mailed and that she approved the payment of the purchase price to Thomason, as her attorney. That certified copy, submitted with a brief handwritten note from Audrey, was received about November 26, 1964.

Upon receipt of the letter accepting the offer to purchase, Coney prepared a warranty deed for execution by Audrey, individually, and as attorney in fact for her estranged husband, conveying the premises to CT as Trustee under Trust No. 47554.

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[2] The full text of that letter follows:

November 17, 1964

Mr. Jack A. Coney, Esquire
First National Bank Bldg.
Peoria, Illinois

Re: Sale of Bride Farm

Dear Mr. Coney:

Having been informed, by Mr. Lowe, today of your conversations this date (November 17, 1964)

I would like to advise you of the following:

1. I hereby approve the price of $13,500.00 as value in full for the remainder interest and fee title of the property known as the Bride farm, located on Spring Bay Road.

2. I authorize you to make payment in the form of a cashiers check payable to Mrs. Audrey Bride Lisner and Mr. William V. Lowe, Trustee.

3. Mr. John D. Thomason, First National Bank Building, Peoria, Illinois has offered to be of assistance to you in opening the title search. You may contact him.

Mr. Lowe has spoken to Mr. Thomason this date November 16, 1964.

I have sent Mr. Thomason a letter this date authorizing his assistance.

Sincerely,

s/ Mrs. Audrey Bride Lisner

The prepared deed was delivered to Thomason for transmittal to his client. In early December, Coney was advised by Thomason that Audrey had stated to him, Thomason, that she would execute the deed and that the same would be personally delivered for her by Lowe to Thomason, at Peoria, for delivery at the time of closing.

On December 7, 1964, Coney met with Thomason, who was accompanied by a person then identified as Lowe, at the CT office. At that time, the deed, as recorded, was delivered to Coney in exchange for his check to Thomason, as attorney for Audrey, in the amount of $13,275.15, the net consideration after payment of costs of title insurance and documentary stamps. On December 10, 1964, the deed was recorded. Coney has never seen Audrey, and he met Lowe only at the time of closing.

Coney had never received any complaint from, or objection by, Audrey until a short time before January 14, 1977, the date upon which this complaint was filed.

Dr. Coney and Mr. Thomason are both now deceased.

The above recital of facts is taken largely from the affidavit of Coney and from exhibits thereto attached, including photocopies of the correspondence from Audrey, and of the cancelled check from Coney to Thomason, which was endorsed by Thomason, as attorney for Audrey, and presented for payment on the date which the same bears. Those facts are accepted as stating the factual background of this litigation, inasmuch as none are contested by any verified statement by Audrey or any other person. Indeed, in their most recent brief, plaintiffs seem to have abandoned their hints of fraud. Thus, plaintiffs now state that this case involves an "attempted execution" of a power before the power existed, and argue that "Audrey's attempted conveyance" is void.[3]

[3] There appears some indication that the ephemeral hints at fraud were designed to bridge any eventuality which prosecution of the

Against the factual background, the single issue, well pleaded, is the legal question whether the warranty deed delivered by Audrey did effectively convey the realty to Coney subject to Isadore's life estate. Decision of that question depends upon a determination as to the estate and interests created by the Nicholas will and a further determination as to the legal effect of Audrey's attempted conveyance of her interest during Isadore's lifetime.

The intent of the testator under the codicil appears reasonably clear. His will created the following interests:

a. A life estate in Isadore;

b. A successive life estate in Audrey, with her beneficial right of possession deferred until termination of the primary life estate; and

complaint might produce. At an earlier stage of briefing, plaintiffs suggested that similarities between the handwriting of one Linda Chase, a former Coney secretary, and the "Audrey" signatures suggest that the "Audrey" signatures on the warranty deed could have been signed by Mrs. Chase. That suggestion was met by the affidavit of Mrs. Chase that she was born December 16, 1951, that she was 12 years of age on the date which the deed bears, and that she first met Coney and was employed by him in May of 1971. By the latest memorandum, plaintiff now abandons that suggestion, though they yet state that the noted similarities do suggest the possibility that the warranty deed may have been forged. That "suggestion" is rejected without further comment.

In similar vein, in response to interrogatories, Audrey stated in effect that she does not know the identity of persons who contrived with Coney to "overreach" her, but she believes that such persons may have been Scherrer, Thomason, and Dr. Coney. She further states that "she believes" that Mr. Thomason may have been the drawer of the check for about $12,000, which she is alleged to have received.

The court can only rely upon plaintiff's most recent statement of position, and does construe their position to be limited to an allegation that Audrey attempted to exercise a power which did not exist until after the death of Isadore. This comment, made advisedly, rests upon the fact that plaintiffs, being faced with verified factual statements as to the total transaction, have come forward with not a single provable fact having any tendency to support a fraud theory.

c. A remainder in fee to designated classes of persons, alternatively, which was subject to Audrey's power to convey the whole remainder interest after the life estate to Isadore.

Upon admission of the will to probate, Audrey had a vested remainder in her life estate. *E.g., Wills v. Southwell,* 334 Ill. 448 (1929); *St. Louis Union Trust Co. v. Hearne,* 111 Ill. App. 2d 411 (5th Dist. 1969). Vested remainders are alienable under Illinois law. *E.g., Friedman v. Friedman,* 283 Ill. 383 (1918).

Plaintiffs do not challenge those legal principles. Nor do they challenge the further principle that the power in Audrey to convey the fee interest was a power appurtenant to Audrey's vested remainder. *E.g., Rock Island Bank and Trust Co. v. Rhoads,* 353 Ill. 131 (1933); *Boyle v. Moore,* 299 Ill. 571 (1921); *Wallace v. Foxwell,* 250 Ill. 616 (1911). What they do contend is that the power appurtenant could not come into being until the primary life estate in Isadore was terminated.

A certain amount of ambiguity does pervade the expression of intent contained in the will. By clause Fifth of his will, executed in 1951, Nicholas devised a life estate to Isadore and, "subject to * * * terms and conditions hereinafter set forth," a successive life estate to Audrey, with remainder over to Audrey's children. Such terms and conditions included the designation of a trustee to manage the real estate "after the death" of Isadore until Audrey "has attained the age of Thirty-five years," and the provisions that Audrey, "after she shall have attained the age of fifty years," shall have full power and authority to sell and convey all or any part of the real estate.[4]

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[4] "FIFTH: I give to my said brother, Isadore J. Bride, for and during the term of his natural life, the following described real estate, two-wit:

> North Half of the Northeast Quarter; and North Half of the Northwest Quarter; and the North Twenty-six rods off of the east One Hundred and Twenty rods of the South Half of the Northeast Quarter; all in Section Twenty-four, in Township Twenty-seven North, Range Four West of the Third Principal Meridian, in Woodford County, Illinois,

during which time he shall be entitled to the net income from said real estate and, from such income, shall pay all taxes, insurance, necessary repairs, etc., thereon.

"Subject to such life estate and subject to all the terms and conditions hereinafter set forth, I give said described real estate to my said niece, Audrey Jean Bride, for and during her lifetime, with remainder to her child or children (either natural or adopted) and their heirs.

"Such terms and conditions are as follows: After the death of said Isadore J. Bride and until said Audrey Jean Bride has attained the age of thirty-five years, said real estate shall be managed and looked after for her benefit by Thomas Lindsey, of Clinton, Illinois, who shall collect the income from such real estate, apply the same in payment of the necessary expenses in connection with such property, including taxes, insurance, repairs, etc., and pay the net income from such real estate over to the said Audrey Jean Bride. After she becomes entitled to receive the income from such real estate herself, she shall pay all such expenses in connection with the proper maintenance and unkeep of such property and keep said premises in a proper state of repair. After she have attained the age of fifty years, said Audrey Jean Bride shall have full power and authority to sell, dispose of and convey all or any part or parts of said real estate at any time or times and the purchaser or purchasers thereof shall not be required to look to the application of the proceeds of such sale, but shall take full and complete title by deed or deeds from my said niece. In the event of any such sale or sales by her, my said niece shall be entitled to the proceeds of such sale or sales without any further accounting therefor.

"In the event of the death of said Audrey Jean Bride without leaving any child or descendant thereof, then I give such real estate that might otherwise pass to her child or children to those persons who would be my heirs at law determined as though my death should have occurred at the time of the death of said Audrey Jean Bride."

The codicil, executed in 1953, follows the same general pattern of devises, i.e., a life estate to Isadore, a successive life estate to Audrey, and a power of sale in Audrey. The "terms and conditions" were prefaced, as were those in the original will, by reference to a time frame "after the death of" Isadore. It designated a trustee to manage the realty until Audrey "shall have attained the age of twenty-five years," at which time she would become entitled to receive the income from the land directly.

The power of sale is created in that context, in the pertinent language as follows:

> "After [Audrey] shall have attained the age of twenty-five years and become entitled, also, to the income from such real estate, said [Audrey] shall have full power and authority to sell, dispose of and convey all or any part or parts of said real estate at any time or times and the purchaser or purchasers thereof shall not be required to look to the application of the proceeds of such sale, but shall take full and complete title by deed or deeds from my said niece. In the event of any such sale or sales by her, my said niece shall be entitled to the proceeds of such sale or sales without any further accounting therefor. * * *."[5]

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[5] The codicil provided, in pertinent part:

"I, NICHOLAS BRIDE, of Metamora, Illinois, make and publish this as a Codicil to the Will made by me on August 30, 1951:

"I hereby revise the Fifth Clause of said will so as to delete such Fifth Clause from said will, as it was written, in its entirety and by inserting and putting in its place the following clause, which shall then be the Fifth Clause of my Will, to-wit:

"FIFTH: I give to my said brother, Isadore J. Bride, for and during the term of his natural life, the following described real estate, to-wit:

(Legal description omitted)

during which time he shall be entitled to the net income from said real estate and, from such income, shall pay all taxes, insurance, necessary repairs, etc., thereon.

"Subject to such life estate and subject to all of the terms and conditions hereinafter set forth, I give said described real estate to my niece, Audrey Jean Bride, for and during her lifetime, with remainder to her child or children (either natural or adopted) and their heirs.

"Such terms and conditions are as follows: After the death of said Isadore J. Bride and until said Audrey Jean Bride shall have attained the age of twenty-five years, said real estate shall be managed and looked after for her benefit by Cletus Bride, of Washington, Illinois, who shall collect the income from such real estate, apply the same in payment of the necessary expenses in connection with such property, including taxes, insurance, repairs, etc., and pay the net income from such real estate over

The dispositional provisions of both the original will and the codicil reflect the testator's awareness of the disparity in age between Isadore and Audrey. When the original will was executed, Isadore was already past seventy years of age and Audrey was fourteen. When the codicil was executed, Audrey was less than sixteen years of age. In both documents the expectation that Isadore would not live until Audrey had attained what the testator deemed to be an age of discretion is reflected in the designation of a trustee to manage the real estate for Audrey's benefit. Initially, that age of discretion was deemed to be thirty-five years and, laterally, the age of twenty-five years. It is clear that the objects of testator's bounty were Isadore and Audrey, the former for the enjoyment of the property for his life and the latter for the enjoyment of the full beneficial interest in the remainder after Isadore's life estate.[6]

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to the said Audrey Jean Bride. After she becomes entitled to receive the income from such real estate herself, she shall pay all such expenses in connection with the proper maintenance and upkeep of such property and keep said premises in a proper state of repair. After she shall have attained the age of twenty-five years and become entitled, also, to the income from such real estate, said Audrey Jean Bride shall have full power and authority to sell, dispose of and convey all or any part or parts of said real estate at any time or times and the purchaser or purchasers thereof shall not be required to look to the application of the proceeds of such sale, but shall take full and complete title by deed or deeds from my said niece. In the event of any such sale or sales by her, my said niece shall be entitled to the proceeds of such sale or sales without any further accounting therefor. This power shall not give my said niece the right or authority to mortgage or create any lien on said real estate.

"In the event of the death of said Audrey Jean Bride without leaving any child or descendant thereof, then I give such real estate that might otherwise pass to her child or children to those persons who would be my heirs at law determined as though my death should have occurred at the time of the death of said Audrey Jean Bride."

[6] It appears from a certified copy of the Inheritance Tax Return filed in the Nicholas Bride estate that the probate court did assess tax upon the various interests as being a life estate to Isadore and the remainder after that life estate to Audrey.

The genesis of the power to convey the fee was expressly fixed at the time of Audrey's reaching fifty years of age, by the original will. That same power was given to Audrey by the codicil after she should attain her age of twenty-five years and "also" become entitled to the income from the real estate.

In the context of the conditions stated in the codicil, it does appear that the "also" clause was a mere recital of a course of events as Nicholas anticipated them then, i.e., that Isadore would not live until Audrey attained her age of twenty-five. That apparent intention seems further manifested by the language used in the grant of the power that Audrey had the power to sell "all" of said real estate and that any purchaser would "take full and complete title" by a deed from Audrey. That direction could not possibly prevail so long as Isadore lived without impinging upon his life estate. Yet, the "also" clause cannot be ignored, since it is couched in the phraseology of a possible limitation on the power within the testator's intention. Though one must question whether the testator did intend the clause as a limitation upon the power, it may nevertheless reasonably be so construed.

On that basis, the crucial question is whether the power could be effectively exercised by Audrey before one stated condition for its exercise is realized.

Although no Illinois decision precisely in point is found, the answer to that question must be affirmative.

A somewhat similar situation was before the Illinois Supreme Court in the recent case of *Rosenthal v. First National Bank of Chicago*, 40 Ill.2d 266 (1968), which involved the question whether a secondary life tenant having a power to appoint the remainder could legally exercise the power before the expiration of the primary life estate. The court held that it was immaterial whether the appointment occurs before or after termination of the primary life estate, and that the appointee under the

power takes as a remainderman, with enjoyment and possession deferred pending determination of the primary estate. Among other cases, the court cited *Cowman v. Classen*, 156 Md. 524, 144 S. 367 (1944).

Cowman involved a life estate to A, a successive life estate to B, and a testamentary power in B to appoint the remainder in fee. B predeceased A and exercised the power of appointment by her will. The court stated that a power which is dependent on a contingent event may be exercised before the occurrence of the contingency, and that such exercise of power is effective upon the occurrence of the contingency. To the same effect is the statement by the Supreme Court of Virginia that a contingent power may be exercised before the contingency happens. The existence of the contingency merely delays the effect of its exercise. *Machis v. Funk*, 18 S.E. 197 (1893).

The testator's dispositional scheme is fully carried out by sustaining the exercise of the power in this situation. He created a life estate in Isadore which is not affected by the transaction. He created a vested life estate in Audrey, with enjoyment deferred, coupled with a power in her to sell and convey the remainder after her life estate for her use and benefit. Audrey obtained the monetary benefit of her remainder interest, at a sale price which she expressly approved in writing, under circumstances almost precluding anything approaching "overreaching." Her exercise of the power conveyed to Coney her remainder interest after the life estate to Isadore.

Despite the protestations of Audrey that she "thinks" she signed a quit claim deed, it cannot be considered as disputed that the warranty deed, as reflected in an exhibit to the complaint, is the document which Audrey executed. The affidavit of Convey, and exhibits attached thereto, presents a verified statement of a sequence of events which remain wholly unrefuted. These commence with Scherrer's initial contact with Coney and continue through Coney's offer to purchase, Audrey's written

acceptance of that offer and Audrey's designation of Thomason to represent her, to the payment of a valuable consideration by Coney and his acceptance and recording of the instrument.

It is clear that plaintiffs are estopped by the covenants of warranty in the deed from bringing this action. Section 8 of the Illinois Conveyances Act provides that any warranty deed which is substantially in the statutory form therein provided warrants to the grantee the quiet and peaceable possession of the premises, and that the grantor will defend the title thereto against all persons who may lawfully claim the same. Ill. Rev. Stat. 1975, c. 30, § 8.

A full exposition of the legal effect of covenants of warranty under the statute is found in *Biwer v. Martin*, 249 Ill. 488, 495-497 (1920). The court there states the following guiding principles:

a. Covenants of warranty are synonymous with covenants of quiet enjoyment, and the same constitute covenants that the grantor and his heirs are forever barred from claiming the estate and that they will defend the title when it is assailed by a claim of paramount title;

b. Covenants of warranty by estoppel operate to convey after-acquired title;

c. A grantor in a warranty deed is not permitted to attack a title the validity of which he has covenanted to maintain;

d. Covenants of warranty apply with equal force whether a deed conveys a present or a future interest; and

e. That covenants of warranty are obligatory upon the heirs, personal representatives and assigns of the grantor.

The deed in issue substantially followed the statutory form. It bears the signature "Audrey Jean Bride Lisner," individually

and as attorney in fact for her estranged husband. It bears the standard acknowledgment before Elvin F. Skaggs, a notary public for Los Angeles County, California. After specifically describing the real estate, the document recites that it is made:

> "Subject to outstanding life estate in Isadore J. Bride under the terms and provisions of the Last Will and Testament and Codicil of Nicholas Bride, deceased. This conveyance is made pursuant to the power and authority contained in the said Will of Nicholas Bride, deceased."

Applying the above statute, as interpreted by the courts of Illinois, plaintiffs cannot refute the covenants of warranty made by Audrey and maintain this cause of action against these defendants.[7]

The delay of more than twelve years before filing this complaint is both cited to the court by defendants and noted by the court. The full implication of such delay bears more critically upon the "hinted at" claims than it does on the question of the validity of the exercise of the power. Thus, it is not deemed necessary to further consider the matter.[8]

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[7] Plaintiffs do assert the obvious fact that defendants had knowledge of the provisions of the Nicholas Bride will, and they argue that defendants were chargeable with notice in 1964 that Audrey did not then have the power to convey. Their argument ignores the fact that Audrey was possessed by like knowledge and is chargeable with like notice. The reasonable implication of the circumstances is that all parties then acted under their mutual understanding that Audrey did have power to convey. If that reasonable implication is to be avoided, then that avoidance would raise the serious difficulty of Audrey now explaining why she accepted $13,500 for a warranty deed which she then knew to be a nullity.

[8] The court has no difficulty in entering a summary judgment for the defendants upon the merits of the issue of the validity of Audrey's exercise of the power to convey. A certain difficulty does arise if that judgment be construed to embrace the merits of other peripheral issues which are only suggested by, but not adequately pleaded in,

No genuine issue of fact material to the legal issues before the court do exist, and defendants are entitled to judgment as a matter of law.

Accordingly, IT IS ORDERED that plaintiffs' motion for summary judgment is DENIED. IT IS FURTHER ORDERED that defendants' motion for summary judgment dismissing the complaint is ALLOWED, plaintiffs to bear the costs of suit.

/s/ ROBERT D. MORGAN
United States District Judge

Entered: Nov. 7, 1977.

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the complaint. Thus, further pursuit of litigation is not necessarily completely foreclosed by the court's judgment order.

It seems appropriate to comment, however, that it would appear to be extremely difficult to fashion any complaint which could, first, overcome the evidentiary materials now before the court, and, secondly, display with any conviction why the statutes of limitation or the doctrine of laches, or both, would not condemn any such complaint to abject failure.

APPENDIX D

Illinois Revised Statutes (1977)
Chapter 28, Section 1

The common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British Parliament made in aid of, and to supply the defects of the common law, prior to the fourth year of James the First, . . . shall be the rule of decision, and shall be construed as of full force until repealed by legislative authority.

Illinois Revised Statutes (1977)
Chapter 30, Section 6

If any person shall sell and convey to another, by deed or conveyance, purporting to convey an estate in fee simple absolute, in any tract of land or real estate, lying and being in this state, not then being possessed of the legal estate or interest therein at the time of the sale and conveyance, but after such sale and conveyance the vendor shall become possessed of and confirmed in the legal estate to the land or real estate so sold and conveyed, it shall be taken and held to be in trust and for the use of the grantee or vendee; and the conveyance aforesaid shall be held and taken, and shall be as valid as if the grantor or vendor had the legal estate or interest, at the time of said sale or conveyance.

Illinois Revised Statutes (1977)
Chapter 30, Section 8

Every deed in substance in the above form, when otherwise duly executed, shall be deemed and held a conveyance in fee simple, to the grantee, his heirs or assigns, with covenants on the part of the grantor, (1) that at the time of the making and

delivery of such deed he was the lawful owner of an indefeasible estate in fee simple, in and to the premises therein described, and had good right and full power to convey the same; (2) that the same were then free from all encumbrances; and (3) that he warrants to the grantee, his heirs and assigns, the quiet and peaceable possession of such premises, and will defend the title thereto against all persons who may lawfully claim the same. And such covenants shall be obligatory upon any grantor, his heirs and personal representatives, as fully and with like effect as if written at length in such deed.